No. 04-19-00192-CR
No. 04-19-00193-CR
(Consolidated Appeals)

IN THE COURT OF APPEALS

FOURTH JUDICIAL DISTRICT

AT SAN ANTONIO, TEXAS

JOHNNY JOE AVALOS
Appellant

VS.

THE STATE OF TEXAS
Appellee

ON APPEAL FROM THE 437th DISTRICT COURT
BEXAR COUNTY, TEXAS

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

IDENTIFICATION OF THE PARTIES

In accordance with TEX.R.APP.P. 28.1(a), a complete list of the names and addresses of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision in this case.

Complainant:

The State of Texas

Appellant:

Johnny Joe Avalos

Appellate Counsel:

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Trial Judge:

The Honorable Lori Valenzuela
Judge Presiding
437th District Court
Bexar County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Avalos's appeal presents an issue of first impression in Texas. He urges this Court to recognize that the imposition of a sentence of automatic life without parole release on Mr. Avalos, an intellectually disabled adult, violates the Eighth Amendment to the United States Constitution and Texas' own constitutional prohibition and cruel or unusual punishment, as provided in Art. I, Section 13 of the Texas Constitution. Although its holding has not been specifically applied to an adult with intellectual disability, Mr. Avalos argues that the Supreme Court's opinion in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that an automatic life without parole sentence imposed on juveniles violates the 8th Amendment to the United States Constitution, should extend to Mr. Avalos, because his intellectual disability affords him, for all intents and purposes, juvenile and other qualifying status under the Eighth Amendment. Alternatively, Mr. Avalos also argues that *Miller* and its progeny, as well as recent authority from the state of Illinois should be persuasive authority to convince this Court to grant Mr. Avalos relief under Article I, Section 13 of the Texas Constitution.

Oral argument would thus be of benefit to this Court.

STATEMENT OF THE CASE

Appellant Johnny Joe Avalos (Appellant, Mr. Avalos) was charged with the murder of 2 and 3 women, in Cause Nos. 2018-CR-7068 and 2016-CR-10374, respectively. Mental health evaluations were conducted by experts for both the state (CR60;70) and the defense (CR46;71), all of whom found and agreed that Mr. Avalos is intellectually disabled, with IQ scores of 66 and 67. CR46-70.

Mr. Avalos filed an original and an amended motion to declare Tex. Pen. Code Section 12.31(a)(2) unconstitutional under the Eighth Amendment to the United States Constitution, and Article I, Section 13 of the Texas Constitution, because it required the imposition of an automatic life sentence, without the possibility of parole. CR269;281 respectively.[1] The motions were denied by the trial court. CR280;293. After his amended motion was denied, Mr. Avalos pled guilty to both indictments. RR5-6; CR90-267. Prior to imposing a sentence, and after asking whether there was any legal reason why the Court could not impose a sentence, Mr. Avalos reiterated his constitutional challenge to Texas Penal Code section 12.31 (a)(2), requested that he be allowed to present mitigation evidence, and that Mr. Avalos be eligible to receive a sentence within the statutory range applicable to a murder conviction, or 5-99 years, or life, but with the possibility for release on parole. The Court noted the objection and denied the request, and sentenced Mr.

[1] The exhibits (A-D) to the amended motion are found in CR307-350.

Avalos to two concurrent life terms, without the possibility of a parole release. RR13-14; CR25-26.

On March 21, 2019, Mr. Avalos filed motions for a new trial – specifically, for a new sentencing hearing in each case - reiterating his legal grounds under the federal and state constitutional provisions, and again presenting the previously introduced documented evidence from experts for the state and the defense in support of his motions, and requesting that Mr. Avalos be allowed to be sentenced to a range of 5-99 years, or life, with the possibility of parole. The motions were properly presented to the Court, and the Court denied them on their merits. [2]

Mr. Avalos filed a timely notice of appeal, challenging the trial court's denial of the pretrial motions to dismiss, his oral objection and request before sentencing, and his motions for new trial. CR411.

Under an order of this Court, both causes have been consolidated into a single appeal, under Cause Nos. 04-19-00192-CR and 04-19-00193-CR.

[2] The Clerk's Record does not contain the certificates of presentment or the orders denying the motions for a new trial that were signed by the trial court on March 26, 2019. The undersigned will request that the clerk's record be supplemented to include these documents.

STATEMENT OF THE FACTS

Mr. Avalos was indicted for, and pled guilty to capital murder, specifically, the murder of five women. Testing by experts for the state and the defense have determined that Mr. Avalos is intellectually disabled, with aggregate IQ score between 66 and 67.

Dr. Joan Mayfield:

Dr. Mayfield, a neuropsychologist appointed to assist the defense, evaluated Mr. Avalos at several intervals prior to his plea.

On May 14, 2016, testing began on Mr. Avalos. Dr. Mayfield explains that "regardless of the definition used (AA IDD, DSM-5. or Texas Health & Safety Code). a diagnosis of intellectual disability is based on three criteria: 1) significant limitations in intellectual functioning: 2) significant limitations in adaptive behavior as expressed in conceptual, social, and practical skills: and 3) onset before age 18. CR50. There are school records indicating that he began attending special education classes in third grade and had an ARD (admission. review, and dismissal meeting). CR51. Records indicated that Mr. Avalos was never in a regular education class setting: he was educated in a resource room or a self-contained mild/moderate/severe special education setting. *Id*. Through testing, Dr. Mayfield determined that Mr. Avalos suffered from intellectual disability, resulting in a "Full Scale IQ" of 66,

described as "Extremely Low." CR51. Mr. Avalos's scores were "consistent with the presence of significant limitations in intellectual functioning." *Id*. For example:

> 2. Deficits in adaptive functioning (the second criteria) refers to how well a person meets community Standards 10.8 of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. "Adaptive functioning may be difficult to assess in controlled settings (e.g. prisons. detention centers); if possible, corroborative information reflecting functioning outside those setting should be obtained" (DSM-5 - p. 38). Adaptive functioning consists of three domains: conceptual, social, and practical.
>
> a. Conceptual Skills includes language; reading and writing; and money, time, and number concept. Prior school records indicate Johnny was placed in special education during the third grade. He was except from the Texas Assessment of Academic Skills (TAAS) due to his ARD in the fourth and fifth grade. When Johnny was in the 7th grade, his instructional level was at the third grade. In the 8111 grade. he tested at the 3'd and 41h grade level for the Texas State-Developed Alternative Assessment (SDA). He dropped out of school in the 9th grade. Johnny was administered the WRAT-IV by this writer to measure his academic skills. Current testing indicated a strength in his phonetic abilities to read words; however, when required to read a short passage and insert a missing word based on contextual skills, his abilities were in the extremely low range. These same phonetic skills aided Johnny's spelling (low average range). Johnny exhibited extremely low abilities with his math skills. He was able to solve simple addition, subtraction, and one digit multiplication and division problems. He had difficulty with regrouping, fractions, and decimals.

Id. In that same report, Dr. Mayfield noted several scores that linked his capacity in several aspects of learning, to a grade school equivalent. *Id*. For example, Mr. Avalos's word reading resulted in an grade equivalent of 10.8, with sentence

comprehension, spelling, and math computation much lower, at grade equivalents of 3.6, 6.3 and 3.7, respectively. *Id*. Dr. Mayfield elaborates:

> b. Social Skills include interpersonal skills, social responsibility. self-esteem, gullibility, naivete (*i.e.,* wariness), follows rules obeys laws, avoids being victimized, and social problem solving, Johnny was always withdrawn. He preferred to spend time by himself. He had one best friend growing up. He always appeared younger than his peers. According to Crystal, Johnny was frequently bullied in school and kids called him "weird'" or "retarded." Johnny did not have a good self-concept, he would say he was dumb and that he wished he wasn't retarded. Although Crystal is 5-6 years younger than Johnny. she has always felt like he was her younger brother. Johnny never had a girlfriend. Mother reported that Johnny needed assistance to make decisions.
>
> c. Practical skills include activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone. Johnny does not have a driver's license, but he is able to ride a bicycle. He is able to get around to familiar places using the bus; however, he is not able to read a bus map and someone must teach him the route to go to new places. His mother would write down directions for him. There were a couple of times when he would call his mother because he got lost. He has never had a checking account and does not know how to manage money. Mother reported that she had to help him with his money. According to his sister, when he is given change, he would not know if the change was correct. He is not able to follow directions to cook for himself. He can use a microwave but not the stove or oven. If given a list of groceries and money. he would have difficulty buying the groceries and paying for them. For safety concerns, he was never given the responsibility to stay home and take care of the younger children. Johnny mowed the lawn for one of his neighbors. Johnny had to be taught to use the lawn mower. However, on one occasion, he put his hand down by the blades while the mower was running. Because of this, Mr. Beltran always supervised him when he was mowing the lawn. Johnny had trouble keeping up with the schedule of when to mow the lawn and would either return to soon or not come for a long time. When

> Johnny needed to fill out an application, his mother would write down the information and Johnny would copy the information onto the application. At other times his sister Crystal would go with him and fill out the job application for him. Johnny worked as a dishwasher for several years but was ultimately fired when he wrote a derogatory note on Facebook about his boss. According to his sister, Johnny did not understand why this made his boss mad and why he was fired. According to Crystal, Johnny (even as a young adult) required prompting from his mother to brush his teeth. She also helped him dress appropriately for the weather condition
>
> Criterion 2 "is met when at least one domain of adaptive functioning (conceptual, social, or practical)is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more setting at school, at work, at home, or in the community," (DSM-V-p. 38). Based on the information that is available at the time of this writing, Johnny meets significant impairment in the adaptive functional areas of conceptual and practical. At this time, more interviews are anticipated to gather more corroborative information.
>
> 3. Finally. the third criteria is onset during the developmental years, typically prior to age 18. Records indicated that Johnny always struggled in school and required special education support. Per his mother's report, all of his developmental milestones were delayed. he was also late to learn to do things, such as to tie his shoes of button his shirt. Mother also reported that when Johnny was born his doctor stated that Johnny would always be "retarded." There is clear evident that Johnny's intellectual and adaptive function occurred prior to the age of 18.

CR52. Dr. Mayfield concluded that, "[b]ased on information available at the time of this writing, Johnny meets criteria for a diagnosis of Intellectual Disability based on the information provided above." Dr. Mayfield noted a number of scores with their age-equivalence as they relate to Mr. Avalos's "INTELLIGENCE," as computed

through the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) test, with all scores resulting in an equivalence under age 16 (<16:00). CR54. Her scoring for "ACHIEVEMENT" through the Wide Range Achievement Test - Fourth Edition (WRAT4), on subjects such as "Word Reading," "Sentence Comprehension," "Spelling," and "Math Computation" resulted in equivalents for grade-schools 10.8, 3.6, 6.3 and 3.7, respectively. *Id*.

In a second evaluation from November 6-7, 2018, Dr. Mayfield found the following scores with their respective age equivalence (boldfaced, in years:months):

INTELLIGENCE

General Reasoning Index **< 3:6**

ATTENTION/EXECUTIVE FUNCTIONING

Delis-Kaplan Executive Function System

Verbal Fluency

Letter Fluency	**16:0 – 19:0**
Category	**15:0**
Category Switching Responses	**< 8:0**
Category Switching Accuracy	**9:0**

Free Sorting

Confirmed Correct Sorts	**< 8:0**
Free Sorting Description Score	**< 8:0**

Tower	**30:0 – 39:00**

Comprehensive Trail-Marking Test (CTMT)

Trail 1	**9:0**
Trail 2	**11:00**
Trail 3	**< 8:0**
Trail 4	**< 8:0**
Trail 5	**< 8:0**

Quotient Score 66 (1 percentile)

Reynolds Interference Task (RIT)

Object Interference	**11:00**
Color Interference	**11:00**

MEMORY

Test of Memory and Learning-Second Edition (TOMAL-2)

Memory for Stories	**5:00**
Word Selective Reminding	**< 5:0**
Object Recall	**8:0**
Paired Recall	**5:6**
Facial Memory	**9:0**
Abstract Visual Memory	**9:0**
Visual Sequential Memory	**11:0**

Memory for Location	**8:0**
Digits Forward	**10:6**
Letters Forward	**8:0**
Digits Backward	**11:0**
Letters Backward	**11:0**
Manual Imitation	**14:0**
Visual Selective Reminding	**< 5:0**
Memory for Stories (Delayed)	**5:6**
Word Selective Reminding (Delayed)	**< 5:0**
Memory for Stories (Delayed)	**5:6**
Word Selective Reminding (Delayed)	**5:0**

LANGUAGE

Boston Naming Test – Significantly Impaired

Comprehensive Receptive and Expressive Vocabulary Test – Third Edition – CREVT – 3

Receptive Vocabulary	**10:0**

Academic Achievement Battery (AAB)

Listening Comprehension

Listening Comprehension	
Words/Sentences	**5:2**
Listening Comprehension	
Passages	**4:6**

MOTOR AND VISUAL PERCEPTUAL

Developmental Test of Visual Perception – Adolescent and Adult

Motor-Reduced Visual Perception	
Figure-Ground	**11:0-11:11**
Visual Closure	**11:0-11:11**
Form Consistency	**11:0-11:11**
Visual -Motor Integration	
Copy	**23:0 – 29:0**
Visual-Motor Search	**11:00-11:11**
Visual-Motor Speed	**11:0-11:11**

CR55-59. On

Dr. Kate E. Glywasky

Dr. Kate E. Glywasky, a neuropsychologist hired by the state, evaluated Mr. Avalos, and among materials she reviewed was Dr. Mayfield's first report. CR60. Her background information about Mr. Avalos is largely similar to the history collected by Dr. Mayfield. *Id*. She adds that, "[a]ccording to SMHC 2002 records, the defendant's cognitive functioning was estimated as 'below average,'" with his

"cognitive development also described as 'Below' for problem solving." CR62 "Based on a combination of educational history, demographic information, and portions of the current evaluation, Mr. Avalos's premorbid IQ was estimated to fall in the Intellectually Deficient to Borderline range compared to same-aged peers." CR63. As did Dr. Mayfield, Dr. Glywasky, determined through the testing and history collected, that Mr. Avalos scored a "Full Scale IQ" index of "67," which falls within the "1st % ile," described as "Extremely Low." *Id*. She explained that "[b]ased on records reviewed, clinical presentation and test results, the defendant meets diagnostic criteria for Intellectual Disability in accordance with Diagnostic Statistical Manual-5 (DSM-5) and the American Association on Intellectual Developmental Disabilities-11th Edition (AAIDD-11)… In Mr. Avalos's case, his previous and current Full-Scale IQ scores fall below the cut-off score (70 +/- 5)." CR65.

Dr. Brian P. Skop

Dr. Brian P. Skop, a neuropsychologist hired by the state, evaluated Mr. Avalos, and among materials he reviewed was Dr. Glywasky's report. In his "Conclusion" to his own report, Dr. Skop wrote:

> Mr. Avalos has a mild, intellectual disability. He has had 2 psychological evaluations that included well validated instruments to measure intelligence and achievement. In both cases, his IQ tested in the mild intellectual disability range. His Full Scale IQ on the WAIS-

> IV tested at 66 on the first assessment and 67 on the second. Collateral information indicates deficits in achievement throughout his life. Additionally, both psychologists administered testing to assess malingered symptoms at the time of their assessments, and despite him admitting to fabricating hearing voices previously, there was no evidence of malingering with respect to these assessments of his intellectual capabilities.

CR70.

Dr. John Fabian

Dr. John Fabian, a neuropsychologist appointed for the defense, evaluated Mr. Avalos, and among materials he reviewed was Dr. Mayfield's first report. CR80-81. He concurred with all of her findings on intellectual disability, and its levels, and also, at the defense's urging, conducted his own testing addressing, specifically, "Attention" and "Executive" functioning, and "Psychopathology." CR80-81. A "DSM-5 Diagnostic Formulation" rendered the following results:

> Intellectual Disability
>
> Schizoaffective Disorder, Mixed Type by History
>
> Probable Autism Spectrum Disorder by History
>
> Postrttraumatic Stress Disorder with Complex Trauma
>
> Alcohol Use Disorder

Opioid Use Disorder

Cannabis Use Disorder

CR84. Dr. Fabian also conducted a mitigation assessment report. *Id*. Regarding a connection between Mr. Avalos's intellectual disability, his history of limited mental abilities and his mental illness, when compared to individuals of a juvenile age, Dr. Fabian expressed:

> The U.S. Supreme Court in *Miller v. Alabama* 567 U.S. 460 (2012) held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders.
>
> Obviously, Mr. Avalos is not a juvenile offender but committed these offenses as an adult. However, in my opinion, he is functioning more like an 8-year old due to his intellectual disability and his lawyer, Mr. Aristotelidis, wants to consider a legal argument that applies the holding in *Miller* to an adult that is intellectually disabled and brain damaged and functions more like a child. Mr. Avalos essentially thinks, acts, and behaves in many ways as a child or adolescent because of his significant brain dysfunction, intellectual disability, and mental illness.
>
> Mr. Avalos presents as a tri-diagnosed individual with the following three areas of diagnoses and dysfunction:
>
> 1. Brain dysfunction through intellectual disability
> 2. Mental illness related to posttraumatic stress disorder/complex trauma and schizophrenia
> 3. Co-occurring chemical dependency problems to alcohol, cannabis, and opioids.
>
> There is compelling evidence of impairments as to Mr. Avalos' brain function. Despite him being an adult, he again has a damaged and dysfunctional brain that would be pertinent to impairments in a number of areas, especially related to overall intelligence, language and

> executive functioning. The holding in *Miller* certainly includes the [United States Supreme Court] recognizing developmental characteristics of adolescents and recent neuroscience research showing that adolescent brains are not fully developed in regions related to higher order executive functions such as impulse control, planning ahead, and risk evaluation. That neuroanatomical deficiency is consonant with juveniles demonstrating psychosocial, social, and emotional immaturity. Along these lines, Mr. Avalos has brain damage and dysfunction related again to his history of intellectual disability coupled with neuropsychiatric disorders of schizophrenia and complex trauma/posttraumatic stress disorder. These conditions cumulatively place him with significant emotional, cognitive, and behavioral impairments that leave him functioning in a childlike fashion. Consequently, these detrimental conditions affecting his brain functioning should be considered as to his overall moral culpability and ultimately as to his sentencing.

CR88-89.

ISSUES ON APPEAL

Whether Texas Penal Code Sec. 12.31(a)(2) violates the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishment, because it requires the imposition of an automatic life sentence in capital offenses, without the possibility of a parole release, on adults with intellectual disability.

Whether Texas Penal Code Sec. 12.31(a)(2) violates Article I, Sec. 13 of the Texas Constitution's prohibition against cruel or unusual punishment, because it requires the imposition of an automatic life sentence in capital offenses, without the possibility of a parole release, on adults with intellectual disability.

SUMMARY OF THE ARGUMENT

Mr. Avalos submits that Texas Penal Code Section 12.31(a)(2) violates the Eighth Amendment to the United States Constitution, and its Texas counterpart, Article I, Section 13 of the Texas Constitution, and is therefore unconstitutional as applied to the facts of his case, because *in lieu* of the death penalty, which could not be imposed on Mr. Avalos given his well-documented intellectual disability, it requires the default imposition of an automatic life sentence on an adult suffering from intellectual disability who is convicted of a capital offense. In support of his arguments, Mr. Avalos presents controlling and developing caselaw from the United States Supreme Court, and from a recent decision by an intermediate court of appeals from Illinois that is currently subject to review by the Supreme Court of that state.

LEGAL ARGUMENTS

ISSUE ONE ON APPEAL (RESTATED)

TEXAS PENAL CODE SECTION SEC. 12.31(a)(2) VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT REQUIRES THE IMPOSITION OF AN AUTOMATIC LIFE SENTENCE IN CAPITAL OFFENSES, WITHOUT THE POSSIBILITY OF PAROLE RELEASE, ON ADULTS WITH INTELLECTUAL DISABILITY.

A. Jurisdiction

On February 19, 2019, Defendant pled guilty to the two capital murder indictments, and was sentenced to life without parole (LWOP). Prior to the plea, the Court entertained original and amended motions to declare Texas Penal Code Sec. 12.31(a)(2) unconstitutional, on the grounds that it violated the Eighth Amendment to the United States Constitution and Article I, Sec. 13 of the Texas Constitution. In support of the amended motion, the Defendant offered, and the Court admitted four exhibits (original Exhibits A-D), reports by Drs. Mayfield and Fabian, (retained by the defense), and for Drs. Glywasky and Skop, (retained by the state). *See* CR46-71. These exhibits were presented in support of Mr. Avalos' constitutional arguments. The court denied both amended motions before receiving Mr. Avalos's plea of guilty.

After Mr. Avalos pled guilty, the Court inquired whether there was any legal reason why Mr. Avalos should not be sentenced, to which the undersigned counsel

objected and reiterated his arguments in support of a ruling that Sec. 12.31(a)(2) violates the Eighth Amendment and Article I, Sec. 13 of the Texas Constitution, the procedure to follow when objecting to and preserving sentencing errors for appeal. *See Mercado v. State*, 718 S.W.2d 291, 296 (Tex. Crim. App. 1986)("As a general rule, an appellant may not assert error pertaining to his sentence or punishment where he failed to object or otherwise raise such error in the trial court."); *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996)(concluding appellant failed to preserve challenge to sentence under state constitution's protection against cruel and unusual punishment because he did not object in trial court); *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995)(concluding appellant failed to preserve challenge to sentence under federal constitution's protection against cruel and unusual punishment because he did not object in trial court). Mr. Avalos's constitutional challenge, as it relates to his sentence, is therefore properly before this Court.

A motion for a new trial provides an alternative vehicle for preserving sentencing challenges *via* motion for new trial. *See Rodriguez v. State*, 917 S.W.2d 90, 92 (Tex App. - Amarillo 1996, *pet. ref'd*)("[N]othing is preserved for review because appellant failed to raise the severity of his sentence when punishment was assessed or in a new trial motion."); *Chapman v. State*, 859 S.W.2d 509, 515 (Tex.App.--Houston [1st Dist.] 1993, no pet.) ("Further, nothing

is preserved for review because appellant failed to raise the severity of his sentence when punishment was assessed or in a new trial motion."). Defendant filed a motion for a new trial in each cause and reurged his constitutional challenges, which were also denied on their merits by the trial court.

B. Standard of Review

An as-applied challenge to the constitutionality of a statute asserts that a statute, although generally constitutional, operates unconstitutionally as to the claimant because of his particular circumstances. *Faust v. State*, 491 S.W.3d 733, 743 (Tex. Crim. App. 2015), *cert. denied*, 137 S. Ct. 620 (2017)). When reviewing the constitutionality of a statute, this Court will presume that the statute is valid and that the legislature acted reasonably in enacting it. *Id*. at 743-44. The party challenging the constitutionality of a statute has the burden to establish its unconstitutionality. *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013).

C. Legal Arguments [3]

1. Introduction

The punishment for capital murder is life without parole if the defendant was eighteen years of age or older at the time of the offense and the state does not seek

[3] Credit for the substance of the majority of the arguments presented in Mr. Avalos's brief is given to Attorney Bobby Mims, of Tyler, Texas, who provided the undersigned counsel with a copy of his own motions containing most of these arguments, and which were also presented in Mr. Avalos's own pretrial motions to dismiss that are referenced in this appeal.

the death penalty. Texas Penal Code Sec. 12.31(a)(2). After the state waived pursuing the death penalty against him, Mr. Avalos, an adult with lifelong ID, received an automatic sentence of LWOP. In *Miller v. Alabama* 567 U.S. 460 (2012), the United States Supreme Court held that juveniles cannot, without violating the federal constitution's Eighth Amendment's prohibition against cruel and unusual punishment, be sentenced to an automatic life sentence without the eligibility of a parole release. Mr. Avalos argues that *Miller's* holding should be extended and recognized as applicable to him, because as an ID adult, he is, for all practical purposes, and in the context of the Eighth Amendment, a juvenile in an adult's body. But even if this comparison is imperfect, Mr. Avalos's history of intellectual disability and mental illness at the very least finds parity with offenders of juvenile age, sufficient to come under cover of the Supreme Court's Eighth Amendment jurisprudence, as most recently developed in *Miller*. Such a finding would necessarily render Texas Penal Code Section 12.31(a)(2) unconstitutional, as applied to him.

2. Texas Penal Code Sec. 12.31(a)(2)

The Defendant challenges the constitutionality of the Texas Capital Murder statute under the Eighth Amendment's Cruel and Unusual Punishments Clause, which is made applicable to the State of Texas by the Due Process Clause of the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660 (1962), and as applied

to him as one who is ID, or as archaically referenced, "mentally retarded." The Defendant is intellectually disabled (ID), as determined and confirmed by all of the experts for the defense and the state who evaluated him. The Defendant was therefore categorically ineligible for the death penalty. *Atkins v. Virginia,* 536 U.S. 304 (2002). *See also Moore v. Texas*, 137 S. Ct. 1039 (2017) (reaffirming the inapplicability of the death penalty on the intellectually disabled, and affirming current medical diagnostic standards, and not Texas's judicially created, non-clinical standards based on lay stereotypes of intellectual disability as the standard by which to determine ID.). Following its own experts's concurrence with Dr. Mayfield's ID findings, the state waived the death penalty against the Defendant. Upon being convicted of capital murder, the Defendant became subject to an automatic life without parole (LWOP) sentence, the sole, non-death, default punishment applicable to an adult convicted of a capital offense in Texas.

The Texas Capital Murder statute is set out in Sec. 19.03 of the Texas Penal Code. The punishment for adults who are convicted of capital murder is set out in Sec. 12.31(a)(2). These sections set out that those convicted of capital murder shall be punished with either death or LWOP. Under this statutory scheme, the determination of whether a person who is convicted of capital murder is eligible to be sentenced to death or LWOP depends solely on whether the person is over age 18.

3. Miller v. Alabama, 567 U.S. 460 (2012)

In *Miller v. Alabama,* 576 U.S. 460 (2012), the U.S. Supreme Court ruled that a LWOP sentence imposed on juvenile capital defendants violates the Eighth Amendment to the United States Constitution. The *Miller* case followed the line of cases beginning with *Roper v. Simmons,* 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). In Texas the legislature amended Texas Penal Code Section 12.31 in an attempt to accommodate the *Roper* line of cases by holding that juveniles convicted of capital murder would be sentenced to life without parole. The Defendant would also show that the *Roper* and *Atkins* line of cases have converged. Specifically, their rationales establishing categorical exemptions from the imposition of the death penalty and LWOP have merged. The Courts in *Atkins* and in *Miller* stated in similar ways that LWOP is a death sentence where the only difference is when death occurs. However, the characteristics of juveniles and the intellectually disabled are similar if not practically identical. Indeed, the Court has used essentially the same reasoning in the *Roper* line of cases as the rationale that conceived the *Miller* decision. As explained in Dr. Mayfield's and Dr. Fabian's reports, practically all of the ID testing conducted on the Defendant resulted in an age equivalency of a juvenile that is well-under age 18.

Recently, the Tyler Court of Appeals addressed Mr. Avalos's reliance on Miller, in a case also involving the assessment of a LWOP sentence assessed against

an ID adult convicted of a capital offense, in *Parsons v. State*, No. 12-16-00330-CR (Tex. App. Tyler - 2018) (not designated for publication). In rejecting Parson's argument "that because of her intellectual disability – possessing "the mind of a 12 year old" - her mandatory sentence of life without parole constitutes cruel and unusual punishment under the U.S. Constitution," the Court reasoned:

> Although some of the reasoning behind the Court's decision in *Miller* might apply to intellectually disabled defendants as well as it does to juveniles, significant portions of the reasoning do not. These reasons include that (1) juvenile offenders have greater prospects for reform than adult offenders, (2) the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders, (3) recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults, (4) a sentence of life without parole is harsher for juveniles than adults because of their age, and (5) a sentence of life without parole for juveniles is akin to a death sentence because of their age. *Id*. 567 U.S. at 471-75, 132 S. Ct. at 2464-66. We know of no reason to believe that these factors apply to intellectually disabled offenders. We conclude that Appellant's right to be free from cruel and unusual punishment was not violated by the imposition of a life sentence without parole absent a punishment hearing. Accordingly, we overrule Appellant's [Eighth Amendment argument].

Parsons, at *12-13. The Court expressed knowing of no reason why the five-part analysis in *Miller* apply to intellectually disabled offenders, and without more rejected Parson's arguments. *Parsons*, an unpublished opinion, is not binding authority.

Mr. Avalos provided the trial court with well documented analyses that provide support for each of the five elements in *Miller*. Other than *Parsons's* unpublished ruling, no Texas court has reached the merits of Mr. Avalos's

arguments. Instructive, however, and strongly persuasive, is a recent decision by the Appellate Court of Illinois, First District, Third Division, which applied *Miller's* holding to adults with ID, under its state constitution. The Court determined that a fifty-year prison term was unconstitutional under the Proportionate Penalties Clause, Ill. Const. art. I, § 11, because the trial court on remand imposed a discretionary *de facto* life sentence without a record sufficient to assess the unique factors that could impact the culpability of the intellectually disabled, and the procedure resulted in constitutional error. *See People v. Coty*, 2018 IL App (1st) 162383, 110 N.E.3d 1105 (August 8, 2018). It elaborated that the imposition of a 50-year de facto life sentence on defendant, without the procedural safeguards articulated by the U.S. Supreme Court decisions in *Atkins*, *Miller*, and its progeny, was a penalty so wholly disproportionate that it violated the moral sense of the community. While, largely for what appear to be procedural default reasons, was decided only on the basis of the Illinois Constitution, it bears noting that the Court expressed that "[it] would reach the same result under both the federal and state constitutions." *People v. Coty*. at 57. Because Mr. Avalos raises issues of first impression, only a direct quote from the Court's opinion can do its reasoning justice:

> In the midst of significant juvenile jurisprudence, however, one must not forget that such jurisprudence began with *Atkins* and the Court's concern with the intellectually disabled. *See Miller*, 567 U.S. at 483-84, 509 (citing *Atkins*, 536 U.S. at 316, 342). In *Coty II*, we already held that under Atkins HN11 adults with intellectual disabilities deserve special treatment in a proportionality analysis (*see Coty II*,

2014 IL App (1st) 121799-U, ¶¶ 61-75). In doing so, we only implied that adults with intellectual disabilities should be treated similarly to minors. *Id*. We now unequivocally hold that they should.

Intellectually disabled individuals, just like juveniles, are less culpable, where the deficiencies associated with intellectual disability "diminish their personal culpability." Atkins, 536 U.S. at 318. Indeed, "clinical definitions of [intellectual disability] require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id*.; *see also* 730 ILCS 5/5-1-13 (West 2014) (defining intellectual disability as "sub-average general intellectual functioning generally originating during the developmental period and associated with impairment in adaptive behavior reflected in delayed maturation or reduced learning ability or inadequate social adjustment"). Intellectually disabled persons "frequently know the difference between right and wrong and are competent to stand trial," but "by definition[,] they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions." *Atkins*, 536 U.S. at 318.

Additional risks accompanying the unique characteristics of the intellectually disabled are the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the fact that they are "typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id*. at 321. In addition, "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and *** are followers rather than leaders." *Id*. at 318.

As such, just as "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders" (*Miller*, at 567 U.S. at 472), the distinctive attributes of the intellectually disabled, who are by their very nature less culpable, diminish "the interest in seeing that the offender gets his 'just deserts'" (*Atkins*, 536 U.S. at 319).

Similarly, with respect to deterrence, the same cognitive and behavioral impairments that make intellectually disabled individuals less morally culpable make it less likely that they can process the fact that their behavior exposes them to severe punishment. *Id*. at 320.

Because intellectually disabled offenders are so unlikely to process the possibility of receiving a sentence equivalent to natural life imprisonment, they are unlikely to control their conduct based on that information. *Id*. at 319-20. Simply put, an intellectually disabled defendant is far less likely than an average adult to understand the permanence of life in prison, let alone weigh the consequences of such a life against the perceived benefit of criminal conduct. As such, just as with minors, it is less likely that the possibility of facing such an extreme sanction will deter an intellectually disabled person from committing a crime. *Id*.

Accordingly, since we hold today that minors and adults with intellectual disabilities should be treated similarly in a proportionality analysis, we see no reason why, under our community's evolving standards of decency, the prohibition against the imposition of discretionary de facto life sentences without the procedural safeguards of Miller and its progeny should not be extended to intellectually disabled persons where the record shows that the trial court did not take into account those characteristics accompanying an intellectual disability as articulated in *Atkins*, so as to show "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Holman*, 2017 IL 120655, ¶ 46. As *Atkins* articulated, those attendant characteristics include, but are not limited to, an intellectually disabled person's diminished capacity (1) to understand and process information, (2) to communicate, (3) to abstract from mistakes and learn from experience, (4) to engage in logical reasoning, (5) to control impulses, and (6) to understand others' actions and reactions, so as to be more susceptible to manipulation and pressure. *Atkins*, 536 U.S. at 318.

In reaching this decision, we acknowledge that thus far our supreme court has declined to extend the *Miller* line of cases to adults. *See People v. Thompson*, 2015 IL 118151, ¶¶ 8-21, 398 Ill. Dec. 74, 43 N.E.3d 984. That decision, however, did not involve intellectually disabled defendants. Moreover, we find that a different determination

> is warranted here. That is because the *Miller* line of cases began with *Atkins*, and explicitly relied on *Atkins's* rationale pertaining to the intellectually disabled, to expand the law to juvenile defendants. *See, e.g., Miller*, 567 U.S. at 483-84, 509 (citing *Atkins*, 536 U.S. at 316, 342); *Roper*, 543 U.S. at 560, 563-576 (discussing *Atkins*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335). As such, it is more accurate to state that *Miller* and its progeny are an extension of *Atkins*.
>
> Moreover, since we agree with those decisions that hold that the Illinois proportionate penalties clause is broader than the eighth amendment [citations omitted] and requires consideration of the constitutional objective of "restoring an offender to useful citizenship" (internal quotation marks omitted) (*Leon Miller*, 202 Ill. 2d at 338), an objective that is "much broader than defendant's past conduct in committing the offense" (*see Gipson*, 2015 IL App (1st) 122451, ¶ 72), we find that the procedural safeguards originating with *Atkins*, and created by *Miller* and its progeny are applicable to intellectually disabled defendants under our constitution.

People v. Coty, 2018 IL App (1st) 162383, 425 Ill. Dec. 47, 110 N.E.3d 1105 at 70-77. On January 31, 2019, the Illinois Supreme Court granted leave to Appeal the intermediate appellate court's ruling, and remains pending. Mr. Avalos adopts the reasoning in *Coty*, and urges this Court to follow suit, and sustain Mr. Avalos' arguments under authority of the Eighth Amendment.

To the extent that some of the elements in *Miller* are not – or could not be - adequately addressed by the experts's findings,. Avalos submits that it may well be that *Miller's* five-part analysis is not, as presented by the Supreme Court, a proper fit in the case of an adult with intellectual disability, and argues that for the reasons stated in *Miller*, and the cases and arguments discussed and presented below, respectively, this Court should recognize that an automatic LWOP sentence for

adults with ID in capital cases nevertheless violates the Eighth Amendment's prohibition against cruel and unusual punishment, and grant Mr. Avalos relief.

4. A LWOP Sentence is the Equivalent of a Death Sentence

The U.S. Supreme Court has stated that LWOP shares some of the same characteristics of the death penalty. *Graham*, 560 U.S. at 69 (2010); *see generally Miller, supra*. The Eighth Amendment, which "reaffirms the duty of the government to respect the dignity of all persons," *Roper,* 543 U.S. at 560, prohibits the execution of persons with intellectual disability. No legitimate penological purpose is served by *de facto* executing, *via* LWOP sentence, those suffering from ID. *Atkins,* 536 U.S. at 317, 320; *Hall v. Florida,* 134 S.Ct. 1986 (2014).

The *Graham* case also likened LWOP sentences for juveniles to death sentences. LWOP sentences "share some characteristics with death sentences that are shared by no other sentences." 560 U.S. at 69. And the court in *Graham* treated LWOP for juveniles like this Court's cases treat the death penalty, imposing a categorical bar on its imposition for nonhomicide offenses. By likening LWOP sentences for juveniles to the death penalty, *Graham* makes relevant this Court's cases demanding individualized sentencing in capital cases. In particular, those cases have emphasized that the sentencing authority must be able to consider the mitigating qualities of youth. In light of *Graham's* reasoning, these decisions also

show the flaws of imposing mandatory LWOP sentences on juvenile homicide offenders.

5. Legitimate Penological Goals under the Eighth Amendment

The Supreme Court also considers whether a LWOP sentence serves legitimate penological goals. *Graham, supra* at 560 U.S. 68, *Roper, supra,* at 571-572; *Atkins,* 536 U.S., at 317, 320. *Roper* established that because juveniles have lessened culpability, they are less deserving of the most severe punishments. 543 U.S. at 569. As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.,* at 569-570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.,* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.,* at 569. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Graham, supra*.

There exists an almost exact rationale in the juvenile categorical exemptions set out in *Roper* as there are in those set out in *Atkins.* The Court there stated that

mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premediated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability. *See generally Atkins, supra*.

It would be very difficult to distinguish the Court's rationale in *Roper* from that in the *Atkins* line of cases. Indeed, the rationales are virtually the same, and accordingly the comparison of one to the other is submitted as authority for the Court to grant the Defendant's motion to declare the Texas Capital Murder statute unconstitutional.

6. Consideration of Relevant Mitigation Factors

The Supreme Court has held that LWOP shares some of the same characteristics as the death penalty. *Graham*, 560 U.S. at 69. The Court said LWOP and the death penalty only vary in how the sentence is carried out. Either way, the

result is death. The Supreme Court in *Lockett v. Ohio,* 438 U.S. 586 (1978) held that the Ohio mandatory death penalty, upon the finding of certain facts, was unconstitutional. The Court in *Lockett* explained that in order to meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigation factors. In 1978 the Ohio death penalty statute, like the present Texas Capital Murder statute, did not permit the type of individualized consideration of mitigation factors required by the Eighth and Fourteenth Amendments in capital cases. Once he was convicted of capital murder, Mr. Avalos was prevented from presenting any punishment evidence to mitigate against the imposition of a LWOP sentence, in violation of his rights as set out above in the United States Constitution.

7. Proportionality Analysis

The Texas Capital Murder statute does not permit the sentencing scheme to enter into a proportionality analysis before the imposition of the default LWOP sentence, regardless of the underlying crime for which the Defendant is convicted. Additionally, the statute violates the finding in *Ring v. Alabama,* 536 U.S. 584 (2002) which held that only a jury may impose a death sentence. As the Court has found that LWOP is qualitatively the same as the death sentence in *Roper, Atkins, Graham* and *Miller,* then under the holding in *Ring* only the jury can impose a capital sentence. And, the jury must be given the opportunity to hear mitigating evidence against the imposition of a LWOP sentence. The law must give the jury a means of

giving effect to this evidence and the Defendant an opportunity to lessen his moral blameworthiness.

7. Mitigation Evidence in Support of A Sentence Less than LWOP

Defense attorneys representing capital murder defendants are required to meet certain guidelines, as established by the American Bar Association Guidelines for Capital Defenders, those contained in the United States Supreme Court's holding in *Wiggins v. Smith,* 539 U.S. 510 (2003), and the Guidelines and Standards for Texas Capital Counsel as promulgated by the State Bar of Texas. The guidelines require that defense counsel conduct a complete and thorough investigation of the capital defendant, his background, his mental health and whether or not he is ID, and further, to be prepared to present all evidence that would mitigate against the imposition of the most severe punishment that the law provides. However, despite all of the defense team's best efforts, there is no vehicle under the present Texas Capital Murder statute whereby a jury is allowed to hear any evidence on punishment or any evidence that would mitigate against the imposition of a LWOP sentence. Under the capital murder scheme as currently set out in Sec. 12.31(a)(2), Mr. Avalos was prohibited from presenting any evidence to mitigate against the imposition of the most severe sentence of LWOP.

The reports provided in support of Mr. Avalos's arguments, particularly the one submitted by Dr. Fabian, contain but a snapshot of the extensive mitigation

evidence that could have been presented on behalf of Mr. Avalos at a hearing under a sentencing scheme that permits a sentence within the full range of punishment for a non-capital, murder conviction, up to, and including LWOP. It is without cavil that capital offenses represent the most serious types of crime in our system of justice. But this should not preclude a trier of fact from considering all mitigation and other evidence relevant to a proper punishment, as is now required with juveniles who are convicted of capital crimes. The requested sentencing scheme would not invalidate a LWOP sentence, but would allow it as an option, *along* with an entire range of incarceration.

D. Conclusion

The Defendant is intellectually disabled. He has mitigation evidence to present that a jury could consider as militating against the imposition of LWOP. The characteristics of persons with intellectual disability are similar and substantially the same as juveniles. The Supreme Court has held that juveniles are categorically ineligible for the imposition of the death penalty. *See Roper, supra*. The Supreme Court has held that mentally retarded (intellectually disabled) are categorically ineligible for the imposition of the death penalty. *See Atkins, supra.* The U.S. Supreme Court has held that juveniles are categorically ineligible for the imposition of a LWOP sentence. *See Miller, supra.* All three decisions were 8th Amendment cases that determined capital punishment was cruel and unusual for juveniles and

the intellectually disabled. The Defendant is similarly situated as those capital defendants in these cases and accordingly states that, as applied to him, the Texas Capital murder statute is unconstitutional and violates the Eighth Amendment.

ISSUE TWO ON APPEAL (RESTATED)

> TEXAS PENAL CODE SECTION SEC. 12.31(a)(2) VIOLATES ARTICLE I, SECTION 13 OF THE TEXAS CONSTITUTION BECAUSE IT REQUIRES THE IMPOSITION OF AN AUTOMATIC LIFE SENTENCE IN CAPITAL OFFENSES, WITHOUT THE POSSIBILITY OF A PAROLE RELEASE, ON ADULTS WITH INTELLECTUAL DISABILITY.

Art. I, Section 13 of the Texas Constitution prohibits "cruel or unusual punishment," while the Eighth Amendment of the United States Constitution prohibits "cruel and unusual punishment." *Ajisebutu v. State*, 236 S.W.3d 309, (Tex. App. Houston [1st Dist.] - 2007).

True, Texas courts of appeals have declined requests by appellants to apply different standards to the federal and state provisions regarding cruel and unusual punishment, and have addressed these federal and state constitutional provisions jointly. *Ajisebutu v. State*, 236 S.W.3d 309, 311 n.2 (Tex. App. 2007). (citations omitted).

Notwithstanding, Mr. Avalos urges this court to consider that, if unconvinced that Mr. Avalos merits relief under the federal constitution's requirement of both "cruel and unusual" punishment, by simple logic, its Texas counterpart, which

requires only a finding of cruel, *or* unusual punishment, to the exclusion of the other, presents a more expansive standard for relief.

Lastly, the Texas Court of Criminal Appeals casts a large and dark shadow over our intermediate appellate courts, as evidenced most recently by its refusal to honor the United States Supreme Court's original holding in *Moore v. Texas*, where the latter determined that Texas' the application of the judge-made "*Briseño* factors" to determine intellectual disability were not up to par with the most recent medical standards that now apply. This Court can follow the lead by the Illinois appellate court in *Coty*, grant Mr. Avalos and all other adults with intellectual disability relief under authority of either the Eighth Amendment or Article I, Section 13 of the Texas Constitution, or both, and establish just precedent that is in keeping with established and developing standards on the subject, by the United States Supreme Court.

CONCLUSION AND PRAYER

The Defendant prays for the Court to declare Texas Penal Code Section 12.31(a)(2) unconstitutional, because it violates the Eighth Amendment to the United States Constitution, as applied to the facts in Mr. Avalos's cases; that it reverse Mr. Avalos' concurrent sentences of LWOP; and that it remand his cases for a new punishment hearing, at which he should be allowed to present mitigation evidence in support of a sentence other than LWOP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Opening Brief was served upon the Bexar County District Attorney's Office, in San Antonio, Texas by email, on the 26th day of July, 2019.

JORGE G. ARISTOTELIDIS

CERTIFICATE OF COMPLIANCE

In accordance, and in compliance with Tex. R. App. P. 9.4, I hereby certify that this Appellant's Opening Brief contains 7,918 words, which have been counted by use of the *Word* program with which this brief was written.

JORGE G. ARISTOTELIDIS